

مجلس الأمن

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رسالة مؤرخة ١٧ حزيران/يونيه ٢٠٠٢ موجهة من الأمين العام إلى رئيس مجلس الأمن

أرفق لعنايتكم وعناية أعضاء مجلس الأمن رسالة مؤرخة ١٠ حزيران/يونيه ٢٠٠٢ موجهة من رئيس المحكمة الدولية ليوغوسلافيا السابقة، القاضي كلود جوردا (انظر المرفق).

وملحق برسالة رئيس المحكمة جوردا تقرير أعده على نحو مشترك رئيس المحكمة الدولية ومدعيها العام ومسجلها، وكان قضاة المحكمة قد نظروا في الرسالة ووافقوا عليها (انظر الضميمة).

وتستعرض المحكمة الدولية في التقرير بعض التدابير التي تعتقد أنه يجب اتخاذها إذا أريد منها أن تحقق هدف إنهاء جميع المحاكمات من الدرجة الأولى بحلول عام ٢٠٠٨.

وأول تدبير ينبغي اتخاذه هو التركيز على محاكمة ومقاضاة الزعماء السياسيين والعسكريين وشبه العسكريين الأعلى رتبة الذين يشتبه بأنهم مسؤولون عن الانتهاكات الخطيرة للقانون الإنساني الدولي، المرتكبة في أراضي يوغوسلافيا السابقة منذ عام ١٩٩١.

والتدبير الثاني الذي يكمل التدبير الأول يتمثل في نقل القضايا التي تنطوي على متهمين في الرتب المتوسطة إلى المحاكم الوطنية لمحاكمتهم ومقاضاتهم، علما بأن هؤلاء المتهمين وإن لم يكونوا من الزعماء السياسيين والعسكريين وشبه العسكريين الرئيسيين إلا أنهم، على ما يزعم، مارسوا شيئا من القيادة أو السلطة.

ويتم النظر في إمكانية نقل القضايا التي تخص عدة متهمين محتجزين في الوقت الراهن تحت سلطة المحكمة الدولية إلى المحاكم الوطنية لمحاكمتهم ومقاضاتهم بهذه الطريقة، فضلا عن القضايا التي تخص حوالي ٥٠ فرداً، تتوقع المدعية العامة أن توجه إليهم تهما بحلول الوقت الذي تنتهي فيه من مرحلة التحريات في ولايتها في عام ٢٠٠٤.

واستنادا إلى المكان الذي يزعم أنه وقعت فيه الجرائم المعنية، سيتم نقل هذه القضايا إلى المحاكم الوطنية في البوسنة والهرسك لكي تنظر فيها.

غير أن المحكمة تؤكد أنها لن تنقل قضايا إلى أي دولة إلا إذا كانت على علم بأن محاكمها تستطيع النظر فيها على نحو فعال ومتسق وفقا للمعايير المعترف بها دوليا في مجال حقوق الإنسان وطبقا للإجراءات القانونية السليمة.

وتلاحظ المحكمة أنه وفقا للمعلومات المتوافرة لها، فإن النظام القضائي في البوسنة والهرسك ينطوي على عدد من العيوب الخطيرة. وعليه، ترى المحكمة أنها لن تستطيع أن تنقل القضايا إلى المحاكم الوطنية لهذه الدولة نظرا للوضع الحالي لهذه المحاكم وطريقة عملها.

وترى المحكمة حاليا أن لمحكمة الدولة المنشأة حديثا في البوسنة والهرسك قدرة على أن تشكل محفلا ملائما يمكن أن تحال إليه القضايا لغرض المحاكمة.

ومن أجل تحقيق هذه الغاية، توصي المحكمة بإنشاء فرع داخل محكمة الدولة يكون مسؤولا عن النظر في الدعاوى التي تنطوي على انتهاكات خطيرة للقانون الإنساني الدولي في البوسنة والهرسك. وتوصي كذلك بأنه ينبغي، لفترة أولية على الأقل، أن يكون هذا الفرع مؤلفاً من قضاة دوليين ووطنيين. ويتعين أن تستعرض المحكمة أيضا بعض التدابير التي ينبغي اعتمادها داخل النظام القانوني للبوسنة، وبعض الترتيبات العملية التي يتعين اتخاذها قبل نقل أي قضية.

وإذا تم تنفيذ هذه التوصيات ووضع هذه التدابير والترتيبات، ترى المحكمة أنه يمكن حينئذ نقل دعاوى المتهمين من الرتب المتوسطة إلى محكمة دولة البوسنة والهرسك لمقاضاتهم ومحاكمتهم.

وتسعى المحكمة إلى الحصول على موافقة مجلس الأمن على هذا البرنامج الواسع للعمل.

وإذا وافق مجلس الأمن على هذا البرنامج، تقوم المحكمة باعتماد التعديلات اللازمة في القواعد الإجرائية وقواعد الإثبات التي تتبعها.

ويبدأ نقل القضايا إلى محكمة الدولة في البوسنة والهرسك بمجرد أن يتم التأكد من أن جميع التدابير اللازمة اعتمدت داخل النظام القانوني للبوسنة وتم اتخاذ جميع الترتيبات العملية اللازمة.

وأرجو أن توجهوا نظر أعضاء مجلس الأمن إلى هذه الرسالة وضميمتها.

(توقيع) كوفي عنان

Annex*

Letter dated 10 June 2002 from the President of the International Criminal and Tribunal for the former Yugoslavia addressed to the Secretary General

[Original: English and French]

Following tho letter which Mrs. Del Ponte, the Registrar and I addressed to you on 13 February 2002, I have the honour of sending you our report on the judicial status of the International Criminal Tribunal for the Former Yugoslavia and the prospects for referring certain cases to national courts.

The main purpose of the report is to provide you with a general overview of the status of the International Tribunal and to present you and the members of the Security Council with avenues of thought regarding the reforms to be undertaken for the implementation of a referral process.

I would appreciate your transmitting this document to the members of the Security Council.

Moreover, I wish to inform you that I am sending a copy of the report today to Mr. Paddy Ashdown, High Representative for Bosnia and Herzegovina.

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* Reproduced in the languages submitted (English and French).

I also wish to inform you that the Prosecutor and I will be in Bosnia and Herzegovina from 17 to 21 June 2002 where we will be meeting with the political and judicial authorities of the country as well as the representatives of the international community. This visit should allow us to gather additional information on the functioning of the judicial system in Bosnia and Herzegovina and the possible difficulties encountered there in respect of punishment for war crimes and crimes against humanity. We will send you a report of our trip when we return.

I remain available to you for any additional information on these matters.

(*Signed*) Claude **Jorda**

Enclosure*

REPORT ON THE JUDICIAL STATUS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND THE PROSPECTS FOR REFERRING CERTAIN CASES TO NATIONAL COURTS

June 2002

* Reproduced in the languages submitted (English and French).

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INTRODUCTION

1. Paradoxically, at the moment when the judicial activity of the International Criminal Tribunal for the Former Yugoslavia (the "Tribunal") is at its highest point the need to refer some cases to national courts is most keenly felt. In fact, the Tribunal is operating at full capacity and, as it undertook before the United Nations Security Council (the "Security Council"), is successfully seeing through all the reforms necessary to complete investigations by 2004 and the first instance trials by 2008. At the same time, it is contemplating more than ever having some accused tried by national courts.

2. This situation is due to the conjunction of two factors: the gradual restoration of democratic institutions in the countries of the former Yugoslavia and the increase in the number of arrests of high-ranking political and military figures. At the outset, referring cases to the courts in the States of the former Yugoslavia was admittedly inconceivable because some of them were still at war. Today however, with the return to peace, fragile as it may be, and the reforms of the judicial systems undertaken with the assistance of the international community, the implementation of a referral process of certain cases is an increasingly likely prospect. Moreover, the recent arrests of many military leaders and high-ranking government officials allow the Tribunal to direct its action in a manner more in line with the spirit of the mission it received from the Security Council, that is to give priority to the prosecution of the most serious crimes which directly threaten international peace and security.

3. It was in this new context, which marks a turning point in its history, that the Tribunal decided to present a programme of action setting out how its three organs, the Chambers, the Office of the Prosecutor and the Registry, would co-ordinate to move towards winding down its mission.

4. This programme is consonant with the one presented by the President and Prosecutor to the Security Council in November 2001. The programme proposes, firstly, that the Tribunal's mission be focussed more on the prosecution of those crimes most prejudicial to international public order and, secondly, that some of the cases be referred, under certain conditions, to national courts. The Prosecutor and the President also emphasised the need to ensure first of all that the national courts have the necessary resources for taking on such cases and, in particular, that they operate fairly and with respect for the principles of international humanitarian law and the protection of human rights.

5. This programme of action complements the reforms undertaken two years ago, in particular, the one known as the "*ad litem* Judges" reform[1], conceived principally to allow the Tribunal to hear the cases before it within a reasonable time-limit and complete its first instance proceedings by 2008.

6. This report is the product of joint effort by the President, Prosecutor and Registrar. In January 2002, they created a working group whose mission was to examine the problems

[1] We recall that in January 2000, the Tribunal undertook wide-scale reforms to expedite the resolution of the cases before it and thus conclude its mission by 2008. After an in-depth review of the structure and operation of the Tribunal *(cf. report of May 2000)*, the Judges proposed to the Security Council to amend the Statute in order to provide for the appointment of *ad litem* Judges who would serve with permanent Judges in specific cases. On 30 November 2000, the Security Council approved the Judges' proposals and, for the second time since the establishment of the Tribunal, amended the Statute accordingly (*cf.* Security Council resolution 1329 of 30 November 2000 (S/RES/1329 (2000)). Several important amendments were made to the Rules of Procedure and Evidence in order to expedite the proceedings and make the reforms of the Statute fully effective.

which might arise through the implementation of the process of referring certain cases. In February 2002, they addressed a joint letter to the United Nations Secretary-General (the "Secretary-General") informing him of this initiative. In March and April 2002, the President, Prosecutor and Registrar met with members of the Office of the High Representative for Bosnia and Herzegovina (the "High Representative") responsible for reforming the judicial system of that State, and with them drew up a plan of action taking into account all their priorities. At an extraordinary plenary session on 23 April 2002 the President, Prosecutor and Registrar presented the contents of the report to the Judges of the Tribunal, who agreed with the major directions set out.

7. Part II of the report deals chiefly with the possibility of referring cases to the courts of Bosnia and Herzegovina since, according to the Prosecutor, as matters now stand some of the Tribunal's cases could be referred to its courts. Moreover, with the help of the international community, Bosnia and Herzegovina should soon be undertaking reforms which could lead to the establishment of a court with special jurisdiction over war crimes. If there were to be a change in the Prosecutor's penal policy, the Tribunal could also consider referring some cases to other countries of the former Yugoslavia.

8. This report does not claim to resolve all the problems arising from the implementation of the Tribunal's completion strategy and, in particular, the referral of certain cases to the national courts. Its main purpose is to provide the Secretary-General, the members of the Security Council, the High Representative and the national authorities concerned with *avenues of thought* which will make it possible for them to ascertain the appropriate measures for the Tribunal to be able to combat even more effectively the impunity of the major war criminals and deliver justice fully to the victims.

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9. Two main areas form the basis for this report: 1) a statistical evaluation of the activity of the Office of the Prosecutor and the Chambers to determine the scope of the referral process to be undertaken; 2) a presentation of the main obstacles to the referral of cases to the national courts of Bosnia and Herzegovina and the reforms which must be implemented in order to overcome them.

PART I. DESPITE AN INCREASE IN THE TRIBUNAL'S ACTIVITY, IT CANNOT TRY ALL THE ACCUSED ON ITS OWN AND SHOULD REFER CERTAIN CASES TO NATIONAL COURTS

10. The activity of the Office of the Prosecutor and the Chambers has increased since the adoption of the reforms initiated in January 2000 which came into effect in July 2001 (Chapter 1). However, the Tribunal cannot try all the persons accused of war crimes and crimes against humanity on its own. It must concentrate on the main political and military figures and refer certain cases to the national courts, if necessary with the help of truth and reconciliation commissions[2], provided however that those courts satisfy the requirements of international justice (Chapter 2).

Chapter 1. Increase in the Tribunal's activity

Section 1. Office of the Prosecutor

11. As the Prosecutor stated to the Security Council on 27 November 2001, she has, since the beginning, directed her penal policy towards the prosecution of the most senior political and military figures, leaving the responsibility of trying the subordinates to the national courts. In keeping with the directions she has set, she should complete her investigations by 2004.

12. Moreover, the Prosecutor is increasing her investigative and prosecutorial activity, as demonstrated by the following statistics:

Number of indictments issued: Number of accused:	40 124
Number of indictments at the pre-trial stage: Number of accused at the pre-trial stage:	13 18
Number of indictments at trial stage: Number of accused at trial stage:	9 (3 of which relate to the Milo{evi} case) 12
Number of indictments at appeal stage: Number of accused at appeal stage:	6 15
Number of new investigations to be closed by 2004: Possible number of new indictments by 2004: Possible number of additional accused by 2004:	25 33 100

13. These statistics call for two comments.

[2] On 12 May 2001, at a conference on the establishment of a truth and reconciliation commission in Bosnia and Herzegovina, the President stated that "[s]ince they are not a priority for the International Tribunal, those who physically carried out the crimes should, in my opinion, be encouraged to participate voluntarily in the work of the truth and reconciliation commission and, should it prove necessary, admit to their crimes before it. Confessions of this sort have an important symbolic value and promote national reconciliation. They constitute the unequivocal proof of the fact that mass crimes were committed and represent a form of recognition of the victims' pain. [...] [I]n order to encourage the [intermediary-level criminals and subordinates] to participate in the process of national reconciliation, it might prove necessary to allow the commission to make recommendations to local prosecutors and, in some cases, even to the Prosecutor of the International Tribunal as to what should be done about the prosecution of persons who have confessed all their crimes before it. While it appears unlikely that such recommendations would convince the Prosecutor to withdraw an indictment against a high-level accused, nevertheless they may be considered as mitigating circumstances for sentencing purposes".

14. Firstly, it will be possible to complete the investigations by 2004 only if the States cooperate in handing over evidence, if the Prosecutor is allocated sufficient resources to conduct her investigations and if no new conflict or hostilities falling within the jurisdiction of the Tribunal break out in the former Yugoslavia.

15. Secondly, the completion date for the trials cannot be established with certainty in respect of either current or future indictments. This date depends on factors beyond the control of the Chambers and the Office of the Prosecutor:

- organisation of the trials: the number of trials stemming from each indictment depends on how the arrests take place. If all the accused in one indictment are arrested before the trial commences, it will be possible to hold one trial for each indictment. However, if all the accused are not arrested within a reasonable time-limit, several trials, or two at least, will have to be organised for one indictment and the proceedings will inevitably be delayed[3];

- guilty pleas: it is impossible to predict the number of trials which will be shortened by a guilty plea;

- defence strategy: the length of the trials also depends on the strategy of defence counsel;

- arrests: the length of the trials depends ultimately on the pace of the arrests. If regular arrests are not carried out by the States of the international community, in particular those of the former Yugoslavia, it will clearly not be possible to complete the trials at the Tribunal by the date anticipated. In this respect, it should be recalled that 25 accused currently remain at large.

16. The Prosecutor believes that 25 new investigations should be completed and 33 new indictments issued by 2004. This would mean 100 additional accused.

17. Anxious to respect her commitment to direct her penal policy towards the prosecution of the highest ranking political and military figures, the Prosecutor considers that 10 of those 25 new investigations may be referred to national courts, as matters stand today exclusively to the courts of Bosnia and Herzegovina. These investigations correspond to 17 indictments for 50 possible intermediary-level accused[4]. Therefore without counting the ongoing cases or the indictments already issued, the Tribunal would have to deal with only 16 new indictments involving approximately 50 individuals. Furthermore, assuming that all these persons are indicted and transferred to the Tribunal, only 16 new trials would have to be organised.

18. These figures make keeping to the time-limits set out appear reasonable. Nonetheless, significant advances may still be made with a view to further accelerating the proceedings. This includes changes to the disclosure procedure and more frequent use of judicial notice. Moreover, bolstering the internal structure of the Office of the Prosecutor should increase the effectiveness of its work and this is already taking place.

Section 2. Chambers and Registry

19. The activity of the Chambers and the Registry has been marked by the implementation of the structural and operational reforms of the Tribunal which, as we stated, were initiated in January 2000 and resulted, *inter alia*, in the appointment of *ad litem* Judges who serve with

[3] This situation may give rise to contradictions between the judgements.
[4] *Cf.* para. 31.

permanent Judges in specific cases. Most of the solutions advocated as part of these reforms have come into effect. Many new provisions have thus been incorporated into the Rules of Procedure and Evidence (the "Rules") to expedite proceedings, in particular regarding the power of the Judges at the pre-trial and trial stages. A Co-ordination Council and a Management Committee were created to ensure better co-operation between the Office of the Prosecutor, Chambers and Registry and more effective management of the Tribunal's resources. Reforms to improve the operation of the Appeals Chambers of the Tribunal for the former Yugoslavia and the Tribunal for Rwanda have also been launched. Generally speaking, the purpose of the reforms is to equip the Appeals Chambers with all the necessary tools to deal with their increased workload and to ensure greater uniformity in the case-law of the two Tribunals. Lastly, an international bar is soon to be established at The Hague. This bar will provide defence counsel with an organisation which guarantees respect for their independence and professional ethics, while enabling them to hone their knowledge of international humanitarian law, which should improve the quality and effectiveness of international criminal justice.

20. The implementation of all these reforms will make it possible for the Tribunal to respect the commitments it made to the Security Council, that is to hold six simultaneous trials daily as of the arrival of the *ad litem* Judges in September 2001[5].

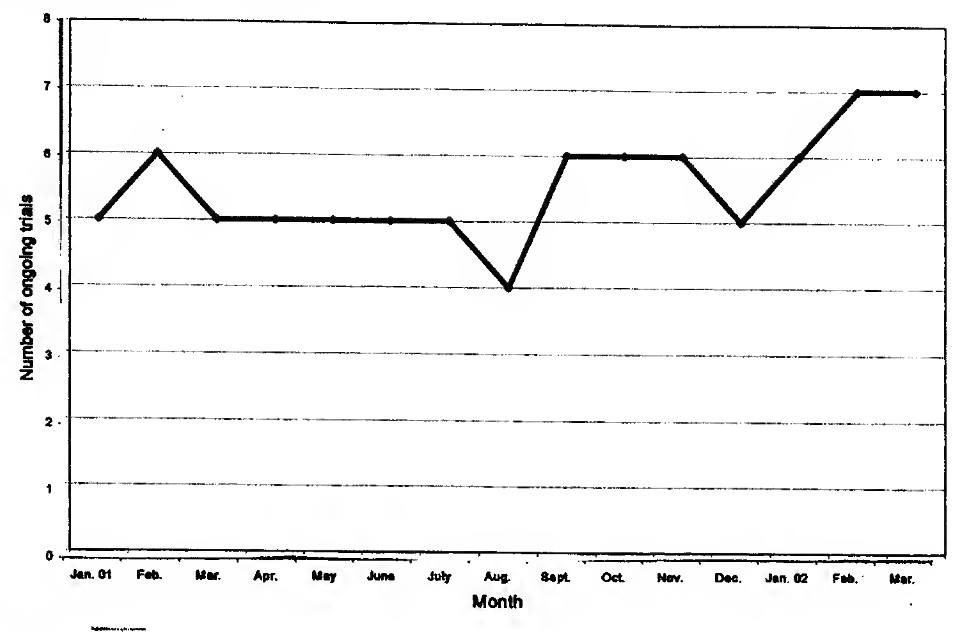
21. However the Chamber's activity cannot be reduced to the number of first instance trials. The considerable increase in the number of cases at the pre-trial stage (graph no. 2) and in the number of appeals (graph no. 3) should also be considered.

22. The consequence of this heightened activity is an unprecedented increase in the number of judicial decisions rendered during the period under consideration (graph no. 4).

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[5] Including hearings and drafting of judgements.

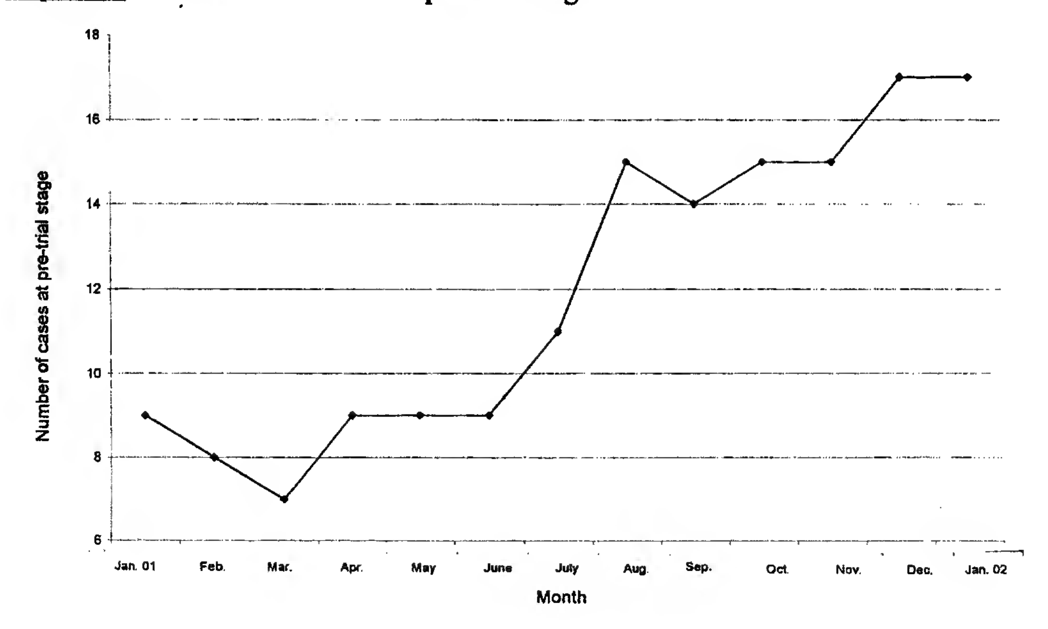
- Graph n° 1 : number of ongoing trials



Observations:

23. This graph shows the increase in the number of first instance trials following the appointment of the *ad litem* Judges. The Tribunal is now holding six or even seven simultaneous trials daily whereas in previous years it held only four. These figures take into account judgements currently being drafted.

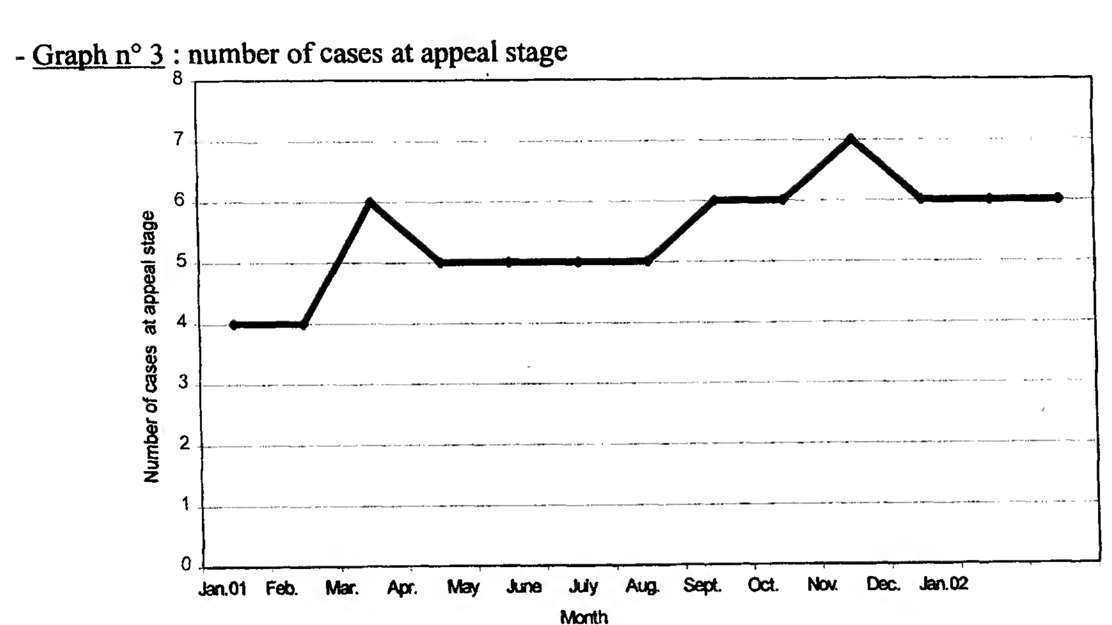
- Graph n° 2 : number of cases at the pre-trial stage



Observations:

24. In addition to the cases at the pre-trial stage, this graph includes those for which the pre-trial stage has been completed, that is those which can now go to trial. In January 2002, of a total of 14 cases, 13 were at the pre-trial stage and 1 ready for trial.

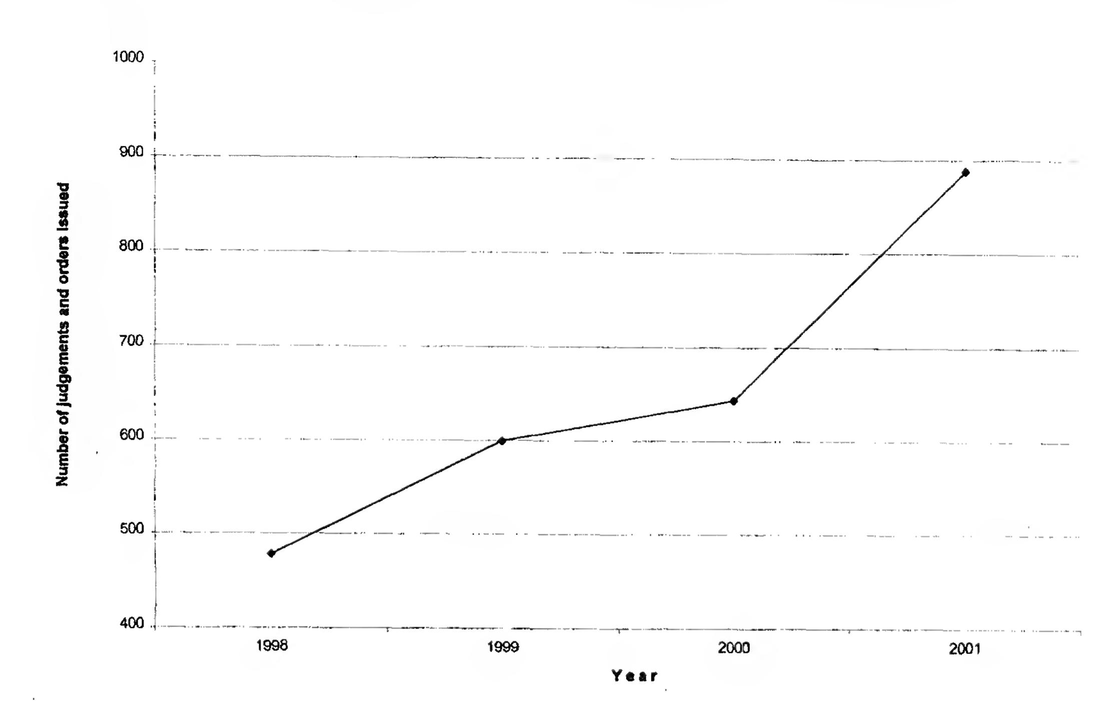
- Graph n° 3 : number of cases at appeal stage



Observations:

25. Each of the six appeals on the merits in January 2002 corresponds to an indictment. They represent 15 accused in all. Eight interlocutory appeals and two requests for review do not appear in this table.


- Graph n° 4 : number of judgements and orders issued as of 31 December 2001



Observations:

26. This graph illustrates the increase in the overall judicial activity of the Tribunal. The number of judgements and orders issued almost doubled between 1998 and 2001.

27. These graphs clearly indicate an increase in the activity of the Trial and Appeals Chambers. The President and Registrar consider that some measures must still be taken to further enhance the Tribunal's effectiveness. The objective set out in the report of May 2000 on the operation of the Tribunal[6], that is to reduce the average length of trials to 12 or even 6 months, has not yet been achieved.

28. To do so, we should *inter alia:*

- take measures to expedite the pre-trial stage of cases so that three cases are always ready for trial which would mean that any interruption in an ongoing trial could be compensated for;

- promote the joinder of related cases which depends on the pace of the arrests[7];

- increase the use of written evidence by better use of the procedures provided for under Rules 71 ("Depositions"), 92 *bis* ("Proof of Facts other than by Oral Evidence") and 94 ("Judicial Notice") of the Rules;

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[6] *Cf.* footnote 1.

[7] Since December 2001, by deciding to join several cases, the Judges have avoided having to organise four trials which would have prolonged the proceedings considerably.

- limit the number of witnesses testifying to a number representative of all the crimes in the indictment, which does not surpass a certain percentage of the total number of municipalities in which the crimes allegedly took place[8];

- ensure that the average stay of the witnesses at The Hague is not more than five days rather than the current 10;

- ensure that the average testimony of a witness does not exceed one day;

- ensure that the number of witnesses called by each party remains reasonable[9];

- ensure that the courtrooms are occupied on a more constant basis[10].

- reduce the length of appellate proceedings;

29. It must be noted that to make the proceedings even more efficient these measures should be adopted and applied at the same time.

30. However, as the President told the General Assembly in November 2001, it should be observed that "every aspect of the proceedings, from the pre-trial management to the appeals judgement, has already been substantially improved and can no longer be appreciably amended without calling into question the principal features of the international criminal trial established under the Statute". The Judges, together with the Prosecutor and the Defence, must therefore take all the measures necessary to implement concretely the reforms already set in place.

Chapter 2. Referral Process

Section 1. Basis for the referral process

31. Bearing the above in mind, several persons currently detained by the Tribunal, as well as a possible 50 or so future accused might be referred to national courts. They are mainly accused in intermediary-level positions between the principal military and political leaders indicted and tried by the Tribunal and the low-ranking subordinates indicted and tried by the national courts. Let us not forget that the Rome Agreement of 18 February 1996 (the "Agreement") already provides a procedure under which the courts of Bosnia and Herzegovina to prosecute and try these people under certain conditions. Under the terms of the Agreement, local prosecutors may prosecute persons charged with war crimes in their courts if they have received the Prosecutor's authorisation to do so granted after she duly examines the case-files supplied to her and the evidence contained therein. To date, the Prosecutor of the Tribunal has received 1,266 files concerning 4,045 suspects from the local authorities and examined approximately 700 files concerning about 2,500 suspects.

32. Therefore "intermediary-level accused" means all those who, though in a sufficiently high-level position of authority to be indicted by the Prosecutor of the Tribunal[11], may be

[8] *Cf.* Judge Robinson's internal memorandum to all the Judges of the Tribunal dated 10 April 2002.
[9] *Ibid.*
[10] The Judges devote a considerable part of their time not only to participating in hearings but also to drafting decisions and judgements. Moreover, the many procedural issues raised by the parties, difficulties linked to the fact that victims and witnesses are far away and the translation of documents inevitably delay the trials.

tried by national courts provided certain conditions have been satisfied. Most important among such conditions is the ability of the national courts fully to conform to internationally recognised standards of human rights and due process in the trials of referred persons.

33. It should be recalled that the Secretary-General was already encouraging the national courts to participate in the trial of war criminals in his report of 3 May 1993, annexed to the Statute. He stated that: "[...] it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to [serious violations of international humanitarian law]. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures"[12].

34. Similar encouragement appeared in the Preamble of the Rome Statute of the International Criminal Court which reads: "[r]ecalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"[13].

Section 2. Implementation of the referral process

35. The implementation of the referral process might require amendments to the Statute and a reformulation of Rule 11 *bis* of the Rules[14]. It might also require the signing of a co-operation agreement between the Tribunal and the national authorities concerned.

36. Article 1 of the Statute theoretically allows the Tribunal to try all serious violations of international humanitarian law, whatever the level of responsibility of the perpetrators, that is both the highest State authorities and the intermediary-level criminals and subordinates. Of course this has not prevented the Prosecutor from directing her action towards the prosecution of the main political and military figures and leaving the responsibility of trying the subordinates to the national courts. However now when we might be seeing the formal implementation of the process of referring cases involving intermediary-level accused it should perhaps be specified that the distribution of cases between the Tribunal and the national courts must be carried out so that the Tribunal has priority in cases involving high-ranking civilian, political and military leaders and so that the national courts will judge the

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[11] Accordingly, the acts ascribed to them will be enumerated in an indictment issued by the Prosecutor and confirmed by a Judge of the Tribunal.

[12] Report of the Secretary-General established pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, S/25704, para. 64.

[13] Rome Statute of the International Criminal Court adopted on 17 july 1998.

[14] Rule 11 *bis* states that : "(A) Where, on application by the Prosecutor or *proprio motu*, it appears to the Trial Chamber that (i) the authorities of the State in which an accused was arrested are prepared to prosecute the accused in their own courts; and (ii) it is appropriate in the circumstances for the courts of that State to exercise jurisdiction over the accused, the Trial Chamber, after affording the opportunity to an accused already in the custody of the Tribunal to be heard, may order that the indictment against the accused be suspended, pending the proceedings before the national courts. (B) If an order is made under this Rule: (i) the accused, if in the custody of the Tribunal, shall be transferred to the authorities of the State concerned; (ii) the Prosecutor may transmit to the authorities of the State concerned such information relating to the case as the Prosecutor considers appropriate; (iii) the Prosecutor may direct trial observers to monitor proceedings before the national courts on the Prosecutor's behalf. (C) At any time after the making of an order under this Rule and before the accused is convicted or acquitted by a national court, the Trial Chamber may, upon the Prosecutor's application and after affording an opportunity to the authorities of the State concerned to be heard, rescind the order and issue a formal request for deferral under Rule 10. (D) If an order under this Rule is rescinded by the Trial Chamber, the Trial Chamber may formally request the State concerned to transfer the accused to the seat of the Tribunal, and the State shall comply without undue delay in accordance with Article 29 of the Statute. The Trial Chamber or a Judge may also issue a warrant for the arrest of the accused".

other violations[15]. In this respect, it should be stated that in resolution 1329, the Security Council took "note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors"[16].

37. Moreover, at the extraordinary plenary session of 23 April 2002, the Judges noted that the Statute contained some ambiguities as to the extent of the Tribunal's power to refer cases to the national courts. They suggested that the Security Council resolve the issue preferably by passing a resolution amending the Statute. It cannot be said for certain that the provisions of Article 29 of the Statute which impose on all the member States a general obligation to co-operate with the Tribunal may be interpreted as allowing the Tribunal to compel the national courts to try the persons referred, whilst respecting the indictments issued by the Prosecutor. Nor is it certain that the provisions of Article 9 of the Statute[17] which establish the principles of concurrent jurisdiction and the primacy of the Tribunal may be interpreted as authorising the Tribunal to implement a more far-reaching referral process than the one currently set out in the Rules. The current version of Rule 11 *bis* of the Rules makes it possible only to suspend an indictment, under limited conditions, in the case of proceedings before the national courts. However, to implement a truly effective referral process, the scope of the application of this Rule must be broadened. This means:

- Allowing certain cases to be referred to the courts of the State on whose territory the crimes were committed.

38. The current version of Rule 11 *bis* of the Rules provides that only the State in which the accused was arrested has jurisdiction. As such, in accordance with the criteria pertaining to the jurisdiction of criminal courts recognised in legal systems throughout the world, the Tribunal should be authorised to refer a case not only to the courts of the State in which the accused was arrested but also to those of the State in which he perpetrated his crimes.

- Authorising the referral of cases involving accused not in the custody of the Tribunal.

39. Rule 11 *bis* of the Rules, as it stands, provides only for the possibility of referring cases involving accused already in the custody of the Tribunal. However, the Tribunal should also be authorised to refer the indictments concerning accused, even if they are not being detained at The Hague, to the national prosecutors or the examining judges. This accused would therefore not be pointlessly transferred to the Tribunal before being returned to the former Yugoslavia, which would avoid considerable delays in the trial proceedings and circumvent sensitive political and diplomatic problems. It may be necessary to amend the Statute in order to provide the necessary authority for the Prosecutor to implement such policy.

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[15] It should be recalled that Article 1 of the Charter of the Nuremberg International Military Tribunal explicitly provided that it was competent to effectuate the "just and prompt trial and punishment of the major war criminals of the European Axis".

[16] Security Council resolution 1329 of 30 November 2000, S/Res/1329 (2000).

[17] We should recall that Article 9 of the Statute entitled "Concurrent Jurisdiction" reads as follows: "1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. 2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal."

- Making it possible for the Tribunal to ensure that the accused to be tried by national courts will have to answer for all the crimes specified in the indictments.

40. Rule 11 *bis* of the Rules presently sets out that when a case is referred the indictment issued by the Tribunal must be suspended pending the initiation of proceedings before the national courts. This wording leaves too much latitude to the national courts which would not be bound to respect the indictment. In order to obviate any risk of impunity, the Tribunal should be in a position to ensure that the accused answer for all the crimes ascribed to them by the Prosecutor, as characterised and confirmed in the Tribunal's indictment. It should be noted that Rule 11 *bis* (c) of the Rules already provides the Tribunal with the possibility of requesting the deferral of a case, in particular when, pursuant to Rules 9 and 10 of the Rules, an "act being investigated or which is the subject of those proceedings is characterised as an ordinary crime" or "there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted".

- Enabling the Tribunal to compel the national judicial authorities to respect the protective measures ordered for victims and witnesses.

41. It is possible that some of the victims and witnesses' statements in the files to be transmitted to the national judicial authorities when a case is referred may be covered by protective measures. Such might be the case in the indictment's supporting material. In order to guarantee fully the safety of the victims and witnesses, provision must be made so that the Tribunal may order that those protective measures be upheld.

- Setting out the criteria for the referral of a case.

42. Rule 11 *bis* of the Rules is currently silent as to the level of responsibility required for an accused to be prosecuted in a national court. Granted, this level is not easy to determine precisely and in the abstract, particularly in the context of a conflict which involved both leaders of States or autonomous entities and civilian and paramilitary groups capable of conducting a widespread policy of terror. However, for reasons of transparency *vis-à-vis* the international community and, more particularly, the States of the former Yugoslavia, in addition to the ability of the national courts to conform to international standards, the Tribunal should take into consideration the position of the accused and the gravity of the crimes with which he is charged. It will be for the Tribunal to assess and set out *in concreto* the main points of those criteria.

- Authorising the competent Trial Chamber to decide *ex officio* to refer a case after having given the Prosecutor and, where applicable, the accused the opportunity to be heard.

43. The Prosecutor objects to the fact that a Trial Chamber may decide *ex officio* to refer a case to a national court. She considers that this would infringe the powers conferred on her by the Statute. It should be noted that current Rule 11 *bis* of the Rules already gives a Trial Chamber the right to act *ex officio*.

44. Should the Security Council approve the above proposals, whether with or without an amendment of the Statute, Rule 11 *bis* would be amended accordingly. Furthermore, the signing of a judicial co-operation agreement between the Tribunal and the national authorities concerned would also have to be contemplated in order to implement concretely the referral

process as well as to resolve the practical problems involved, especially those relating to the mechanism for transferring the accused and handing over the indictments and supporting material.

PART II. BOSNIA AND HERZEGOVINA AND, ULTIMATELY, THE OTHER STATES OF THE FORMER YUGOSLAVIA MUST CARRY OUT CERTAIN REFORMS OF THEIR JUDICIAL SYSTEMS IN ORDER TO BE ABLE TO TRY THE CASES REFERRED BY THE TRIBUNAL

45. This part of the report will deal with the possibility of referring cases to the courts of Bosnia and Herzegovina as the Prosecutor believes that it is the only country that may now be considered for the referral process. This notwithstanding, should the Prosecutor's penal policy change, the Tribunal may contemplate broadening the process to other countries of the former Yugoslavia.

46. The authorities of Bosnia and Herzegovina have begun to reform their judicial system. However, many obstacles to the implementation of the referral process still remain (Chapter 1). Solutions must therefore be found with the assistance of the international community before the cases are referred to that State (Chapter 2).

Chapter 1. Principal reforms of the judicial system in Bosnia and Herzegovina

47. Bosnia and Herzegovina has begun to reform its judicial system. This clearly attests to its determination to comply with international norms.

48. To dwell on a description of all of these reforms here is not appropriate as that is not the purpose of this report, but it is worthwhile listing the reforms which seem the most relevant. They are as follows:

- incorporating violations of the law of war into the criminal codes;
- bringing the codes of criminal procedure into line with the international conventions on the protection of human rights, especially reinforcing the procedural guarantees during the preliminary investigation, judicial examination and trial;
- harmonising the rules of evidence with the requirements of a fair trial;
- adopting measures making it possible to guarantee the status and independence of the judiciary;
- adopting a code of professional conduct for the judiciary.

Chapter 2. Obstacles to setting the referral process in motion and prospects

Section 1. Obstacles to setting the referral process in motion

49. These first reforms are admittedly encouraging. Nonetheless, the judicial system of Bosnia and Herzegovina still seems to display shortcomings too great for it to constitute a sufficiently solid judicial foundation to try cases referred by the Tribunal.

50. According to information obtained from various documents, mostly from the Organisation for Security and Co-operation in Europe, the Council of Europe and the Office of the High Representative, the main obstacles to implementing the referral process are the following:

- Risk of dependency and partiality of the judiciary.

51. Several international organisations present in Bosnia and Herzegovina have underscored the highly politicised nature of the judicial system, as well as the risk of corruption to which such a situation gives rise. In the same vein, the ethnic composition of several of the cantonal and district courts might well lead to problems of bias and partiality[18].

- Lack or ineffectiveness of witness protection provisions.

52. A draft law on the protection of victims and witnesses was prepared but did not go beyond very general considerations. As such, the resulting system is far removed from the one in force at the Tribunal[19].

- Lack of training of the judiciary and law professionals.

53. As in many countries around the world, the members of the judiciary in Bosnia and Herzegovina seem to be lacking some of the experience required for conducting war crimes investigations and judicial proceedings.

- Insufficient financial and logistical resources.

54. The poor working conditions of the court personnel noted by many of the international experts can clearly only impair the effectiveness of the judicial system.

- Slowness of the judicial system.

55. As indeed in many western countries, the judicial system of Bosnia and Herzegovina must cope with the slowness of its proceedings, especially in appeal. The appeals courts often refer cases back to the trial judges who issue a second judgement which is again appealed. Furthermore, there is no limit to the number of times a case can pass back and forth between the courts.

- Incomplete compatibility of national substantive law with international law.

56. The compatibility of internal law with that applicable at the Tribunal can sometimes pose problems, notably as regards command responsibility. The principles applicable at the Tribunal, as laid down in Article 7 of its Statute, are not always applied, or even recognised, in national law.

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[18] The politicisation of judicial office is still perceptible despite the attempts made by the Independent Judicial Commission ("IJC") which is responsible for overseeing the judicial reforms under the authority of the High Representative. For example, the commissions and councils established to rule on whether or not complaints filed against members of the judiciary accused of corruption are founded have so far functioned poorly. Since March 2001, the IJC has been supervising the process by which the judges are evaluated by the competent commissions and councils and the judiciary appointment procedure has been greatly improved since the IJC set out criteria, in particular, for the recruitment interviews. The commission argues that under ideal circumstances the procedure applied in East Germany would be used, that is, all 558 of the judges would be dismissed and asked to reapply for their positions subsequently, which would enable it to review their applications in meticulous detail and to decide, on the basis of their record, whether they are fit to take on their position.

[19] According to current practice, any request for protection of a witness or victim must be submitted to the Supreme Court. If it approves the protective measures, the Court itself hears the witness, whose testimony will be re-transcribed and read out before the competent court at a later stage. If the parties have questions for the witness, they submit them in writing to the Supreme Court, which then puts them to the witness, and the same procedure is repeated over again.

57. All the international experts agree that these difficulties have resulted in the citizens of Bosnia and Herzegovina losing a great deal of confidence in their judicial institutions. It will be possible to re-establish judicial structures capable of responding to the demands of the population and the international community only if much effort is invested, some of it time-consuming.

Section 2. Prospects

1. Possible solutions

58. The aforementioned obstacles could be overcome in several ways. First, the local judges, prosecutors and court personnel could receive additional training in international criminal law and human rights. International judges could be sent to serve in national courts. International observers to oversee the conduct of the trials and, where need be, advise the judiciary could also be sent. More fundamentally, several aspects of the judicial system could be restructured.

59. In August 2001, the Prosecutor contacted the authorities of Bosnia and Herzegovina to suggest that they reflect upon the possibility of establishing an international court composed of a prosecutor and international judges. The Office of the High Representative seems to advocate the use of the future State Court which it considers as the institution in the best position to prosecute and try war criminals[20]. It has set up a working group to study the issue which should make its conclusions known in June 2002[21].

60. The respective advantages and disadvantages of the solutions may be summarised as follows[22]:

[20] The plan has not yet been finalised. Thus far, the Office of the High Representative has taken on a team of consultants to study how well adapted the plan is to the specific context of Bosnia and Herzegovina and to ascertain which mechanisms would make it possible to improve the current judicial system.

[21] The report of the Tribunal therefore does not take into account the conclusions of the working group of the Office of the High Representative.

[22] It should be noted that all the observers of the judicial system agree that the solutions proposed must make it possible to resolve the four following problems: 1. the compartmentalisation of the judicial systems of the two entities is a significant obstacle to the effective punishment of war criminals; 2. the public lacks confidence in its judicial authorities; 3. the ethnic make-up of the courts of each of the entities does not contribute towards inspiring such confidence; 4. the local judges do not have adequate training in international criminal law.

Possible solutions	Main advantages	Main disadvantages	Comparison of the main advantages and disadvantages
Use of the current national system together with training of the local judiciary in international criminal law	The solution 1. makes it possible to use the law and criminal procedure in force; 2. avoids the difficulties linked to implementing a reform of the judicial system; 3. ensures substantial support for the court personnel; 4. can be set in place in a short time.	The solution 1. does not encourage the efforts to reform the judicial institution; 2. limits the action taken to a single type of player in the judicial system.	1. Training the local judiciary is a worthwhile step since it offers a further guarantee of professionalism and, therefore, contributes towards bolstering the public's feeling of confidence in its judicial system. 2. Nonetheless, the proposed training of the judiciary will not in itself suffice to respond to the inherent requirements of the very specific context of Bosnia and Herzegovina. For example, it does not make it possible to resolve the difficulties linked to the compartmentalisation of the judicial systems, which will nonetheless have to be overcome if war crimes are to be punished effectively in Bosnia and Herzegovina.
Use of the current system together with the sending of international observers	The solution 1. makes it possible to use the criminal law and procedure in force without infringing upon State sovereignty; 2. avoids the difficulties linked to implementing a reform of the judicial system; 3. promotes the effective application of international norms; 4. can be set in place in a short time.	The solution 1. does not encourage the efforts to reform the judicial institutions; 2. might make the role of the observers uncomfortable (they could be restricted to a purely passive role); 3. must be applied in conjunction with measures guaranteeing the protection of the victims and witnesses.	1. The sending of international observers could, in the long term, make it possible to restore the confidence of the citizens in their own judicial system. 2. Nonetheless, the model remains insufficient because it does not allow the judicial institutions to be reformed directly, or the difficulties linked to the compartmentalisation of the two entities' judicial systems to be resolved.
Use of the current national system together with the addition of international judges to the local courts	The solution 1. makes it possible to use the criminal law and procedure in force; 2. makes it possible to guarantee that the international norms are better applied; 3. makes it possible to contribute to re-establishing the public's confidence in the local judicial system; 4. potentially enables the international judges to contribute to reforming the judicial system; 5. ensures effective collaboration between the Tribunal and the national	The solution requires significant legislative and judicial changes.	1. The sending of international judges would make it possible to resolve quickly and visibly a number of crucial difficulties pointed to by the international observers (especially the citizens' lack of confidence and the problems linked to the ethnic make-up of the courts). 2. Although it does not allow for a substantial reform of the judicial system, the solution does however have many considerable advantages in the specific context of Bosnia and Herzegovina (see column 1).

	courts; 6. can be set in place in a short time.		
Use of the State Court	The solution 1. makes it possible to use a local judicial institution currently being established; 2. contributes towards encouraging the effort to build the State by the State itself; 3. makes it possible to set in place a uniform practice for punishing perpetrators of war crimes, that is to say, one used State-wide; 4. can be set in place in a short time.	The solution 1. requires national legislation to be reworked in order to establish a specialised chamber at the court concerned; 2. creates a difference between the jurisdictions and powers of the Court and the Tribunal, which are distinct; 3. might bring about a lack of consistency between the procedure applied at the Tribunal and that at the State Court; 4. does not best guarantee the availability and qualifications of the personnel assigned.	1. Using a court currently being set up seems appropriate, as Bosnia and Herzegovina already has many courts. 2. The creation of the court is consistent with the provisions of the national constitution. 3. The creation of a State-level court will make it possible to resolve the problem linked to the separation of the entities, which currently causes major difficulties for punishing the accused. 4. Such a court could be operational quite quickly, as both observers and players involved in the national system agree that the reform of the national system must commence as soon as possible.
Establishment of a special international court	The solution 1. makes it possible to have a judicial structure perfectly adapted to the transfer of cases (it would be given exhaustively defined powers similar to the Tribunal's); 2. guarantees that international norms are applied effectively (especially as regards witness protection); 3. ensures that the Special Court's rules are compatible with the Tribunal's; 4. guarantees that prosecutions are carried out professionally (by making judges and qualified court personnel available).	The solution 1. requires that an additional court be set up. This involves: (a) the adoption of a Security Council resolution; and (b) an amendment of the national constitution which would give rise to long and complicated procedures; 2. would make it necessary to use a criminal procedure greatly different and far removed from the local judicial traditions; 3. would require considerable time to set up an institution of this kind; 4. would compel the international community to assume a considerable financial burden. 5. would be tantamount to not encouraging some of the necessary local reforms; 6. would prevent national judges from trying war criminals as they would defer to international judges.	1. Using a single court fully adapted to trying international crimes seems very attractive. 2. Nonetheless, the establishment of an international court in Bosnia and Herzegovina does not seem appropriate since it in no way contributes towards the reform of the judicial system sought.

2. Solutions recommended by the Tribunal

61. Which model is the most appropriate depends primarily on the specific nature of the cases likely to be referred, cases which, let us not forget, concern war crimes and crimes against humanity.

62. Even if by definition a special international court is perfectly adapted to trying war crimes and crimes against humanity, the option of setting one up presents three major disadvantages. First, it could not be operational immediately since it would require the Security Council to pass a resolution, which cannot be taken for granted. The court would also be extremely expensive, as this would amount to setting up a "mini-International Tribunal" in Bosnia and Herzegovina. Lastly, the solution would add a further court to Bosnia and Herzegovina's already greatly complex judicial scene.

63. The State Court appears much more conducive to reconciling the specific requirement of punishing war crimes and crimes against humanity with the particularities of Bosnia and Herzegovina's judicial system. Among the many advantages of using this Court, special mention should be made of the fact that it conforms fully with the provisions of the constitution, according to which the State has exclusive jurisdiction in matters of international criminal law. In this respect, it should be noted that, in September 2001, the Constitutional Court found that the creation of the State Court was consistent with the constitution.

64. Furthermore, with the State Court it should be possible to guarantee that all areas of law are uniform on a national level as well as to resolve the excessive compartmentalisation of the judicial system between the two entities, which has been particularly apparent in the prosecution and trial of war crimes.

65. Using the State Court would avoid having to set up an additional court whilst also supporting the effort to build the State by the State itself. This is an essential advantage because, as all the observers and players involved in the judicial system of Bosnia and Herzegovina agree, any reform of the judicial system's structures can produce results only if it is consonant with the legal traditions of the State and is carried out with the close co-operation of the existing judicial authorities.

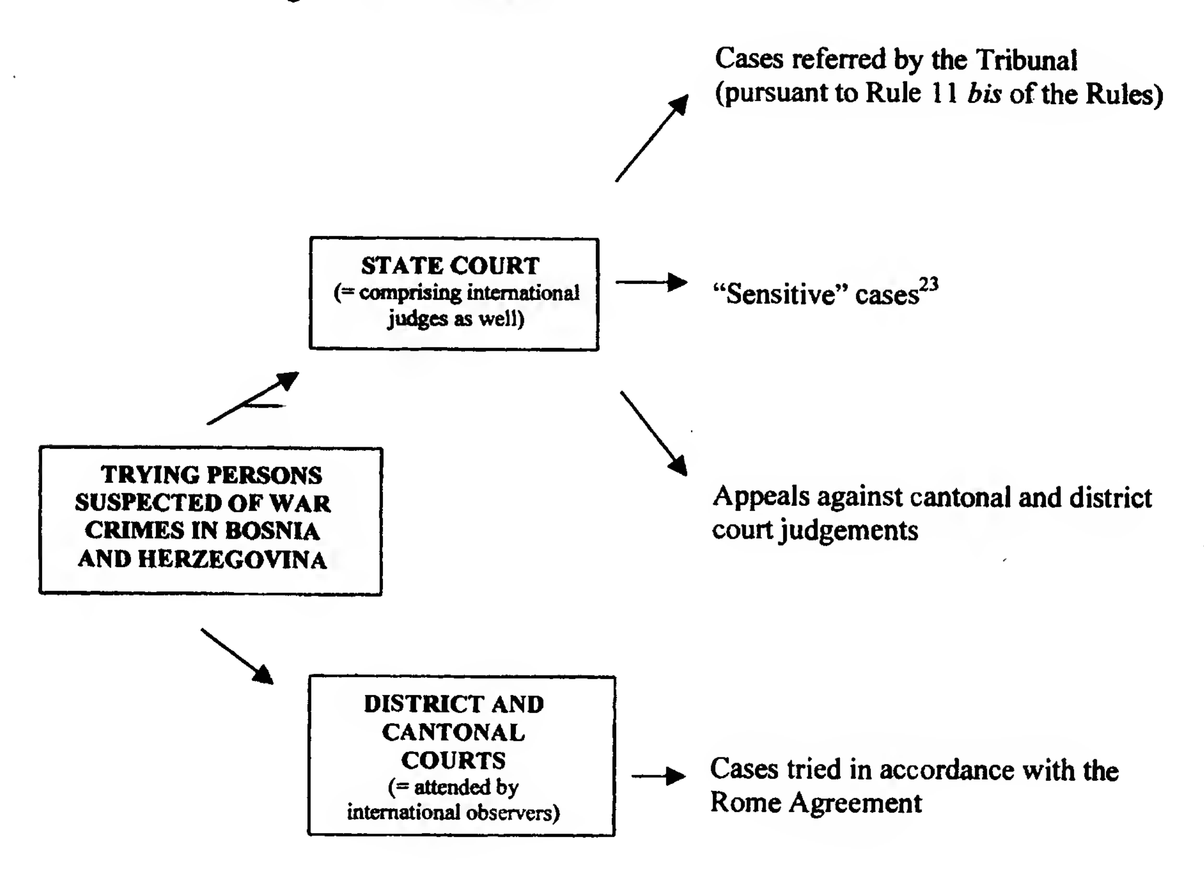
66. Furthermore, the district and cantonal courts should assist the work of the State Court, which alone will not be able to try the very large number of war crimes cases. We are aware that in addition to all the cases involving intermediary-level accused which should be referred by the Tribunal pursuant to Rule 11 *bis* of the Rules, there are all those involving subordinates which the national courts are hearing in accordance with the Rome Agreement which, as we have seen, may number several hundred.

67. The process advocated by the Tribunal precludes a complete upheaval of the judiciary in Bosnia and Herzegovina. Although new structures must admittedly be established, it is also crucially important to work with the existing judicial institutions and organs, if only by helping to make them better, as they constitute irreplaceable reference points for the citizens of Bosnia and Herzegovina. Only by so doing will it be possible to restore the citizens' confidence in the judicial institutions rooted in their culture.

68. In conclusion, the State Court should handle only those cases involving intermediary-level accused which have been referred by the Tribunal, as well as certain cases over which

the district and cantonal courts would ordinarily have jurisdiction but whose sensitive nature requires that they be tried on the national level, an assessment which would be made by the prosecutor of the Court. In addition, the State Court could hear appeals against cantonal and district court decisions. Lastly, international observers should monitor the conduct of proceedings before the district and cantonal courts responsible for trying subordinates in accordance with the Rome Agreement in order to ensure that they conform with the most fundamental guarantees of the criminal trial.

69. The following flowchart illustrates this.



3. Pre-requisites for implementing the recommended solutions

70. Whichever model is selected and whichever reforms are implemented, the participation of the national courts in trying war criminals presupposes that they are in a position to make impartial and independent rulings, in accordance with the principles laid down in the Statute.

71. As such, the authorities concerned should – if they have not done so already – adopt general provisions inherent to the proper functioning of any judicial system, as well as more specific provisions in order to make it possible to punish war crimes and crimes against humanity:

[23] The prosecutor of the Court should decide whether the sensitive cases must be tried by the State Court or the district and cantonal courts.

72. Bosnia and Herzegovina must adopt general provisions in order to:

- ensure fully the impartiality and independence of the judiciary[24] and, in particular, prevent the political authorities from being able to interfere in investigations;

- make sure that arrest and pre-trial detention are covered by guarantees[25];

- ensure that trials are fair[26];

- make sure that the accused and detainees are treated equally no matter their nationality, political views or religious beliefs;

- respect the minimum criteria for the detention conditions of detainees and convicted persons;

- abolish the death penalty and preclude any possible means of reintroducing it.

73. We believe it vital to adapt the existing national laws to the over-riding needs of punishing war crimes and crimes against humanity. Specifically, this would involve:

- sending international judges to serve in the courts responsible for trying cases referred by the Tribunal;

- making the national judiciary more familiar with the rules of international criminal law, through training;

- adapting certain aspects of internal criminal procedure to the requirements of international criminal procedure, especially for the protection of victims and witnesses;

- ensuring that all the serious violations of international humanitarian law established under articles 2 to 5 of the Tribunal's Statute and the principles governing individual criminal responsibility embodied in article 7 thereof are provided for in internal criminal law.

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[24] This means in particular that the members of the judiciary must be sufficiently remunerated and their independence guaranteed.

[25] This means in particular that deprivation of liberty must be restricted to those cases provided for by article 5(1)(c) of the European Convention on Human Rights and that the accused must have the right to be assisted by counsel, where need be, assigned. The Tribunal recalls that the Constitution of the Republic of Bosnia and Herzegovina provides for the direct applicability of international human rights norms, in particular, those of the European Convention on Human Rights and its protocols, and affirms their primacy over internal law (article 2 of the Constitution).

[26] This means in particular that public proceedings must be guaranteed, that the accused must be tried within a reasonable time, that the principles of the presumption of innocence and the equality of arms must be respected and that the victims and witnesses must be duly protected.

CONCLUSION

74. The observations and recommendations in this report are in keeping with the directions the President and Prosecutor presented to the Security Council on 27 November 2001 and which the Registrar reiterated before the Fifth Committee of the United Nations General Assembly during the 2002-2003 budget vote.

75. The main purpose of implementing the Tribunal's completion strategy and referring cases involving intermediary-level accused to the courts of Bosnia and Herzegovina is to complete the first instance trials by around 2008. At that point, the Tribunal will be able to devote all of its resources to appeals, reviews and other proceedings. Our view is that two further judges' mandates will be required to complete these proceedings, which means that the Tribunal will finish its work definitively around 2010.

76. Are these dates unreasonably distant? We do not believe so. Admittedly, such an institution is a considerable financial responsibility and the international community does view it as such. However, as the Expert Group set up to assess the effectiveness of the Tribunal's activities and operations stated in its report of November 1999, "[t]o the extent that there may have been expectations that the Tribunals could spring to life and, without going through seemingly slow and costly developmental stages, emulate the functioning of mature experienced prosecutorial and judicial organs in national jurisdictions in adhering to a high standard of due process, such expectations were chimerical". What is more, account must be taken of the fact that, in all, the Tribunal should have to deal with 74 indictments involving 232 accused, including of course those cases which could be referred to the courts in Bosnia and Herzegovina. These figures are both high and low when compared to the thousands of crimes perpetrated in the territory of the former Yugoslavia during the years of war which could theoretically be subject to international justice.

77. Yet, the dates and commitments set out take into consideration a not-insubstantial degree of uncertainty of which we should not lose sight. It must not be forgotten that arrests have to be effective and rapid, all the accused arrested together, the political situation in the region stabilised and the local courts appropriately adapted so that cases can be referred under conditions consonant with the demands for the protection of human rights and the principles of international humanitarian law – all conditions beyond the direct control of the Tribunal. It must be emphasised that the Tribunal's timetable will definitely have to be reviewed if all these conditions are not met.

78. Are there any other possible ways of accomplishing our mandate more expeditiously? We have always maintained that the current and future reforms could deliver further productivity gains and these include the reforms to the operations and structure of the Appeals Chamber and the creation of an international bar. Other procedural adjustments are under consideration.

79. Yet, let us not deceive ourselves. In terms of the length of the Tribunal's mandate, the gain will be relatively small. The conclusions in this report must therefore be viewed as attainable and reasonable.

80. Is an even more drastic shortening of the Tribunal's mandate possible? Perhaps, although this would presuppose that decisions are taken which, as the texts now stand, would be beyond the province of the drafters of this report. It would also potentially ruin the effort

invested over several years to establish an exemplary system of international justice and could be detrimental to reconciliation in the former Yugoslavia and, thus, keeping the peace.

81. In brief, they involve:

- setting a date for the end of investigations earlier than 2004 as announced by the Prosecutor herself, or indeed, setting a specific terminal date for the mandate. At this time, it appears that no competent authority other than the Prosecutor has the power to do so in respect of the investigations. Granted, the Security Council could set a terminal date for the Tribunal's mandate. As yet, this has not been done. Furthermore, no new factor seems likely to warrant setting such a date[27]. Quite on the contrary, since the Tribunal has never experienced such intense activity. Moreover, even if it were possible, setting the end of the mandate would be profoundly prejudicial to the principle of equality between all the accused, since high-ranking leaders not indicted would be shielded from any prosecution whereas other lower-ranking accused would be tried at The Hague. Would not the credibility of the Security Council be lessened as a consequence?

- concentrating all of the Tribunal's activity on holding a very limited number of particularly exemplary trials. The Prosecutor and, to a lesser extent, the judges could work towards achieving this goal. Perhaps the Security Council should deal with the issue by defining the mandate of the Tribunal more precisely in the Statute or by using any other method it might deem appropriate. It must however be noted that this was not the option originally selected which would have required the highest-ranking military and political leaders to be indicted and arrested at the very outset of the Tribunal's mandate.

- changing the procedure radically to further expedite the trials. Here too the room for manoeuvre is limited. The Rules have been amended over 20 times and this has given rise to much criticism, among some defenders of human rights in particular. Moreover, amendments instituting more expeditious proceedings could run contrary to the Statute. Since current procedure represents a fairly good balance between the two major legal systems, sweeping changes to it could be profoundly prejudicial to the fairness of the trials.

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82. These are the conclusions of the Tribunal's three organs responsible for the mission assigned to them when the Tribunal was established. Naturally, this report represents only one contribution among others to the process of reflection undertaken by all those whose concern, like ours, is to fulfil the mandate given to us by the Security Council: to combat impunity and to render justice to the victims of war crimes and crimes against humanity.

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[27] In this respect, it should be said that on 21 February 2001 pursuant to paragraph 6 of Security Council resolution 1329 (2000), the Secretary-General studied how feasible it was to set a terminal date for the temporal jurisdiction of the Tribunal. He considered "that he [was] not in a position to make an assessment to the effect that peace ha[d] been restored in the former Yugoslavia" and so asserted that he was "not in a position to recommend to the Security Council [such] a date" (Report of the Secretary-General pursuant to paragraph 6 of Security Council resolution 1329 (2000) (S/2001/154)).

PROPOSALS TO THE MEMBERS OF THE SECURITY COUNCIL

83. In order to wind down its mission – that is to complete its investigations around 2004 and its first instance trials around 2008 – the Tribunal must:

- further concentrate its activity on the prosecution and trial of the highest-ranking political and military leaders;
- refer intermediary-level accused, even if they are not yet in the custody of the Tribunal, to the national courts, principally, those of Bosnia and Herzegovina,

84. So as to implement this two-pronged process of "concentration" and "referral", the Tribunal intends to take certain measures in order to ensure that: (1) the accused answer in the national courts for all the crimes specified in the indictments brought by the Prosecutor and confirmed by the judges of the Tribunal; (2) the national courts respect the protective measures ordered by the Tribunal for the victims and witnesses; (3) the national trials are conducted in accordance with the international norms for the protection of human rights.

85. With this in mind, the Tribunal is recommending that a Chamber with the jurisdiction to try the accused referred by the Tribunal be established within the State Court of Bosnia and Herzegovina. It is suggesting that international judges serve alongside the national judges in the State Court for at least a set period. It is proposing that the local prosecutors, judges and court personnel receive training in international humanitarian law. It is considering the possibility of having international observers ensure that the proceedings instigated in the district and cantonal courts pursuant to the Rome Agreement are conducted properly.

86. It is the Tribunal's wish that the Security Council endorse this overall approach and, more specifically, approve the aims set out in paragraph 83 and the mechanisms envisaged in paragraph 84.

PROGRAMME OF ACTION

87. We propose taking the following short- and long-term action in co-operation with the international organisations and States concerned in order to implement the proposals in this report:

1 – **23 April 2002**: presentation of this report to the judges at the plenary by the President, Prosecutor and Registrar; adoption of an agreement in principle on the major directions set out in the report; and proposal to refer the matter to the Security Council;

2 – **23 April to 10 June 2002**: incorporation of the judges' comments into the report following the plenary;

3 – **25 April 2002**: meeting with the group of consultants studying which solutions to implement in order to try war criminals in Bosnia and Herzegovina, with a view to setting a course of action which takes into consideration the concerns shared by the Tribunal and the Office of the High Representative;

4 – **10 June 2002**: sending of the report to the Secretary-General and the Legal Counsel of the United Nations, as well as to the Office of High Representative to Bosnia and Herzegovina;

5 – **17 June to 21 June 2002**: visit of the President, Prosecutor and Registrar to Bosnia and Herzegovina and meetings with the political and judicial authorities concerned to discuss the directions set out in this report and to evaluate the feasibility of its conclusions;

6 – **27 June 2002**: holding of a diplomatic seminar in The Hague to present the report to the diplomats serving in The Netherlands;

7 – **11 and 12 July 2002**: adoption of new amendments to the Rules in order to expedite proceedings further;

8 – **July 2002**: submission of the report to the members of the Security Council;

9 – **first quarter of 2003**: implementation of the process for referring cases to national courts.

88. Of course, the timetable can be met only if all the parties involved co-operate fully. The United Nations, the Office of the High Representative and the States of the former Yugoslavia, particularly Bosnia and Herzegovina, must assume their respective responsibilities in order to contribute to improving the existing judicial structures so that the referral process envisaged by the Tribunal may begin in January 2003.
